



Exposé

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The Right to Work of Irregular Migrants

I. Introduction

1. Research Question

Irregular Migrants, Austria and Greece, Right to Work

Undocumented migrants are residents of many European cities, if not all of them; if not all around the world. When they left their home countries, they did so to escape poverty, dreadful life conditions or conflict. Arriving at a European country they are confronted with unprecedented social exclusion. Beyond the few asylum seekers that succeed in their applications and obtained international protection and regular migrants, the rest is squeezed under the title of irregular migrants. They are those that lack documents authorizing their stay. They nevertheless stay and try to establish their lives. Without residence permits they cannot attain working permission. Informally and without any official documents they work in conditions that often amount to forced labour. They are our modern slaves. In Greece and Austria they are engaged in the informal market, receiving less money for hard jobs. They are health workers, house keepers, blue collar workers in the industrial or the agricultural sector that remain undeclared and unprotected. In this dissertation I will evaluate working conditions and legal rights of irregular migrants in Greece and Austria. The question I attempt to answer is whether irregular migrants have the right to work in the states where they reside and how this is applied in practice.

2. Why Irregular Migrants?

Irregular migration is one of the most discussed topics in political fora mainly accustomed with criminality and threat for our European societies. Classified as irregular migrants they are denied access to work and therefore are officially disabled to cover their basic needs. At the same time they have access to no other supportive mechanism as social protection or family structures of support (in cases of residing in ones' own country family net is assisting in case of poverty or inability to cover ones' needs) that could cover their basic needs. What should the reaction of the hosting state be: Do the states have to provide for their needs, allow them to find a way to cater for themselves or finally do nothing at all? The later reaction is what happens in reality. The answer to the problem though, seems closer to another one: Should irregular migrants cater for themselves, then no needy population would threaten the social welfare of the states. In my dissertation I will try to explain how irregular migrants are *de facto* and not illegal workers and assess the rights deriving from their condition as workers.

a) Situation of illegal Migrants in Austria and Greece

Irregular migrants, without documents authorizing their residence, are not allowed to work. Either detained in closed centres until their expulsion order, due to a pending asylum application, or free without any registered status they can only earn their living in the informal economy¹. The factual conditions of their everyday working life are reported to be dreadful amounting to human rights violations. The notorious Greek case of 'strawberry slaves', where irregular migrants were receiving low wages and working under the hardest conditions on production of strawberries, is a common example of modern slavery. Similar stories of unregistered and unprotected home workers come very often in the light of publicity both in Greece and Austria.

b) What makes a Migrant "illegal"?

In a recent comprehensive research project on irregular migration² it was concluded that migration policy intending to restrict the incoming migrants constructively results in the creation of irregular migrants³. What is meant under the illegality of migrants is not easy to be understood. Entering the soil of a foreign state without visa documents authorizing their entrance they are violating mainly administrative law (in some cases it is also a criminal offence). The legal implications of their offence are grave. They are deprived of a residence permit and are asked to leave the country. The result of their administrative offence is deprivation of the ability to work and therewith to survive. A same legal class of administrative offense is over speed driving but in that case the repercussion is only a fine or a driving licence loss. Their administrative offence seems to deprive them from their right to survive. What are the legal implications of their categorization as illegal? Is it at all a legal status and can it be tolerated by the equality of all human beings?

c) Legal status or equality?

¹ According to the World Bank 'the informal economy refers to activities and income that are partially or fully outside government regulation, taxation, and observation.'

² 'Cladestino' was a recently concluded comparative research project on data and trends across Europe on undocumented migrants coordinated by ELIAMEP and financed by the European commission. See Anna Triandafyllidou, *Irregular migration in Europe: myths and realities* (Farnham England, Burlington VT: Ashgate Pub., 2010).

³ 'irregular migration is not an independent social phenomenon but exists in dependence from state policies and is socially, politically and legally constructed...the(unintended) effects of limiting immigration and restricting employment are that migration is driven into informal, shadow and niche activities.' Cladestino, Comparative Policy brief, 2009.

It seems that irregularity in migration status does not signify the status but the non status. It is the door to exemption from a regular status, as the one attained by citizens or other categories of regular residents, subjects of legal rights. They are equal human beings, regardless. Constitutions do not recognise any category other than citizens, to whom exclusively some rights of passive and active political participation are attributed. All other categorizations that stem from simple statutory law have to adhere to the constitution. Equality clause is safeguarding from unjustifiable discrimination. Are irregular migrants lawfully and proportionally excluded from access to the working market of the state? Are there good reasons to justify their deprivation from access to work?

II. The Right to Work

1. Aspects of the Right to Work

The right to work engulfs the right to earn ones' living and the rights of those who work and the right to develop ones personality. The vast scope of protection of the right to work entails both liberal and social rights. I will try to find out what legal protection is available from both liberal and social rights adjudication. I will therefore adhere to the distinction – even though admittedly disputed - between social and liberal rights as they entail different protective lines of argumentation and scopes. The right to work is a dynamic all inclusive right and an adequate example of indivisibility of human rights.

As Article 23 of the Universal Declaration establishes:

(1) "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests."

The right to work establishes the bridge from liberal free development of the individual to social protection from the state in order to ensure that people are enabled to enjoy those freedom rights.

a.) As a Liberal Right

The freedom to work is enshrined in the right to gain ones living and the right to personal development. It includes the freedom to choose and earn ones' living and the prohibition of forced

labour. In its negative nature as a liberal right the state has to abstain from unjustified interference and prohibit forced labour. The development of understanding of the content of liberal rights might demand states to take positive steps for the realisation of the protection of freedom rights. Positive obligations entail institutional and legal protective mechanisms as well as practical protection of the right to work e.g legal provisions that regulate work, conditions, collective bargaining. The subjects of the rights are free to participate in the market by providing their work and are free to develop their personalities through the profession they choose without interference. The limits of their freedom are prescribed by law that protect the rights of others. In binding legal texts as the ECHR that protect liberal rights an equality clause establishes equal access to the above protection of the right to work.

b.) As a Social Right

The right to work as a social right protects the conditions of work and the opportunity to work. The aspects thereby protected are fair and equal conditions of employment, non discrimination in access to work and equal payment for the same job. Many subsequent to work rights are also linked to the right to work as the right to social security that is based on contributions provided by the work as well as the right to collective bargaining. The legal enforceability of social rights is disputed. From the first social claims appeared in the early 19th century the classification of a right as a social right has been believed to be less legal and more of a political goal. Part of the theory and legal practice consider social rights to be objective obligations that could be realised by the states on condition of their capacities and affordability. Social rights as legal rights demand from the state to take positive steps for the establishment of the protection of the right. In the case of the right to work positive obligations entail legal measures regulating access to fair conditions of work. The state is not therefore considered obliged to provide work to everyone but to ensure that those who work are equally treated, and equally compensated. A long academic discussion that denies the justiciability of social rights and accepts only an objective obligations character is not necessarily verifiable by the case law. Social rights are implemented beyond doubt through the equality clause.

c.) The Right to Work and Equality

It is difficult to ask the state to provide work. It is though also difficult to justify an interference of discriminatory character with the right to work. Equality clause brings social and liberal theory in a common ground. Similar application of the principle of equality makes the comparison between Austrian and Greek more concrete. In Austria the right to work could be protected under the combination of liberal rights and the equality principle, as there is no constitutional protection for social rights or particular the right to work. In Greece that entails in its constitution provisions of social rights and explicit the right to work the scope of protection is still disputed. Nevertheless the

theory and practice accepts that as long as there is protection available for the right to work for instance social security it should be equally accessible to all. Equality can be seen integrated in the constitution as a principle that transcends the application of all rights. Another way of application is in the form of positive steps to eliminate discrimination.

2. The Right to Work in Austria

a.) Art. 6 StGG establishes the right of every citizen to exercise profession in any part of the Austrian territory. *De lege lata* the scope of application of this right is restricted only to Austrian citizens. Nevertheless, after implementation on constitutional rank of the international Convention against all forms of discrimination and after Austria entered the EU with the freedom of all European citizens to work and move the restricted scope of Article 6 StGG is disputed.

b.) Art 7 B-VG initially established the equality before law of all Austrian citizens. The BGBl I 1997/87 that endorsed in the rank of constitutional law the prohibition of all forms of discrimination that guarantees equality of all not only for the citizens. The equality principle of 7 B-VG still applies in the case of Austrian citizens whereas for EU the Article 14 of the ECHR is used to assess differentiated treatment amongst others. On both cases that assessment is similar. Equal things should be treated equal. For an attested differentiated treatment there should be reasonable and lawful justification.

c.) National Statutory Labour Law

It contains all provisions that protect the rights of the employees and workers in Austria. A working contract can also take place *de facto* when the worker provides his work and the employer pays him or her. Are the rights of the irregular worker affected by the irregularity of the contract? What does the Constitutional Court of Austria adjudicate in that respect?

d.) Civil Law

Work is protected also in the case of a non valid working contract according to ABGB. Coming closer to the relationship between private persons were the worker might be discriminated because of his status. Is the equality clause applied in the case of irregular migrants?

e.) European Convention of Human Rights

ECHR is a part of constitutional guaranteed rights in Austria.

- Article 1 of the First Protocol of the ECHR as well as Article 5 of the StGG protects the right to property. The second applies only in the case of citizens; thereby it is not applicable in any other case that concerns a non citizen. The core liberal right protects the right to receive wage, the right to conclude contracts, as well as the right to social security and unemployment benefits when a pecuniary right is established.
- Article 8 ECHR protects private life. The ECtHR stipulates in *Niemietz v. Germany* that the notion of “private life” does not exclude in principle activities of a professional or business nature. According to the case of *Sidabras and Dziutas v. Lithuania* the ECtHR found a violation of the right to private life in the case of two former KGB employees that were banned to work in the private sector. The Court held that the impugned ban ‘*affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives*’ and it violated Article 8 in conjunction with Article 14 of ECHR. A similar ban from access to work for irregular migrants. Is it violating their right to private life?
- Art 14 ECHR requires the application of all rights established by the convention without discrimination on any basis. The formal notion of non discrimination is to control whether the law is making a distinction that is not justified in a democratic society. Can irregular work be protected under the right to property without discrimination on the basis of migratory status? (Article 1 FPECHR in conjunction with Article 14 of the ECHR). Is a total prohibition of irregular migrants from access to work in conformity with Article 8 and Article 14 of the convention?

3. The Right to Work in Greece

Beyond the above protection on the basis of the ECHR that is also applicable in Greece and actually according to Article 28 overrides the Greek constitution in case of conflict, Article 22 para 4 establishes the protection of the right to work as a social right and Article 5 protects the free development of personality that includes the freedom to work. The twofold protective nature encompassing social and civil rights protects the freedom to exercise a profession and the obligation of the state to abstain from interference on the one hand, and on the other hand the obligation of the state to take positive steps toward equal access and fair conditions of work. In Article 22 para 4 the protection entails equal wage for equal work and fair, secure and healthy conditions of work. The scope of application of the right to work in Article 22 para 1 is restricted to citizens. Nevertheless the case law has denied the restriction in the light of Article 5 that applies to all.

III. The Right to Work of Illegal Migrants

1. Protection from State Intervention - Prohibition to Work

a.) Austria

a.1. Legal Basis for the Prohibition to Work

The Austrian Foreigners' Work Act (Ausländerbeschäftigungsgesetz) sets the rules and the preconditions necessary for a foreigner to be allowed to work. A working authorization is strictly related to his regular residence and therefore in the case of irregular migrants it is absent. Interestingly already in 1995 the constitutional court in the case VfSlg 14049/ 1995 stipulated that an absolute number of allowed incoming migrants is not in conformity with the right to private autonomy as established by Article 6 StGG. In the same case the Court stated that it was important to differentiate among the permit in order to fit the public interest adequately. The Aliens Work Act has ever since been amended almost every year. The last amendment incorporated the European Common Migration Pact that enables circular migration and high qualified migration through the EU blue card. In the case of irregular migration the Pact remains very restrictive. Under those premises it is regulated who acquires a work permit and thereby has rights to be protected as worker. How the law has been evaluated by the Court so far? Does the absolute restriction in the case of irregular migrants serve the public interest? What is to be protected under migration law?

a.2. Art. 6 StGG Right to Gainful Activity – Art.7 B-VG

As already introduced the right to gainful activity 6 StGG is also applicable to aliens after the EU access and the implementation of the International Convention against all forms of discrimination. According to 7 B-VG / Art 14 ECHR a differentiating treatment is allowed when it can be justified under the proportionality test of the conflicting interests at place. Could this line of argumentation apply in the case of irregular migrants? Has the Court already dealt with it?

b.) ECHR

b.a Right to property Article 1.Prot.1 - Right to private life Article 8

A similar to the above interference has to be justified when it comes to the right to property and the right to private life when they apply and protect work. They have to be justified in a legitimate aim and have a reasonable relationship of proportionality between the means and the aim. Still a margin of appreciation is reserved to the states. When an irregular migrant is not allowed to work is there an

interference with his right to private life? When an irregular migrant cannot receive fair wage is he interfered in his right to property? Is it reasonable and proportionate to the public interest? What is protected each time; national market? Should private autonomy of irregular migrants be interfered for the protection of prosperity, or the private autonomy of citizens, EU citizens and regular migrants? These are some of the questions that need to be answered in the light of case law.

c.) Greece

c.1 Aliens Act 3386/2005

It regulates the entry and working permits for non EU aliens. Working permits are issued hardly and irregular entering migrants are deprived of working permits. They can only acquire one after been naturalized, and this happens rarely in Greece. Are they interferes legally in their right to work?

c.2 Pecuniary rights from irregular work

Even with a void working contract as the one that exists between an irregular working migrant and his employer the right of his relatives to receive diet after his death is established regardless. The Supreme Court of Greece (Areios Pagos) held in its decision 3/2004 that the relatives of an irregular migrant worker were entitled to receive diet after his lethal work-accident. The basis upon relatives are entitled to diet is not the legality of the working contract but the work provided. The nullity of the working relationship did not affect the civil right to compensation of the relatives. Could we assume civil rights protection for irregular migrants from this type of case law?

c.3 Social security

The interference with their pecuniary property rights based on their provided work is also seen in their right to social security and benefits. Without a valid working contract they cannot be entitled for any work related benefit or security in case of an accident other than emergency health care, which is not considered as a welfare benefit. Where are the limits of social welfare in terms of irregular migrants? Under which legal norms are they excluded from social welfare benefits and how this stands the proportionality test when appreciated under the light of their right to property. How the last question is to be understood when the state does not allow them to have earnings on the first place and denies social welfare on the second?

c.) Conclusions

In the conclusions the final results of the comparison between the system of simple and constitutional protection of the work of irregular migrants as appear to be in both countries will be presented. Some questions that seem already to be there: Is the monistic liberal

approach of Austria, that does not include social rights in the constitution more flexible and applies easily in the case of irregular migrants? On the opposite direction, does written constitutional premise on the right to work protect better the work of irregular migrants? What system applies better?

IV. Final Conclusions

Finally are states obliged according to their social contracts, their constitutions, to protect everyone who is working in their territory? What System gives Migrants what kind of opportunities. Where are the advantages / disadvantages of each system?

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